Human Dignity of Workers and Competition

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1. The point of departure: The worker treated as an object

In a market economy, labour is a commodity. The economic existence of the worker depends on the development of the markets. This is obvious for self-employed workers, but employees are in a comparable situation: If the employer gets into economic difficulties, the wage-earner becomes redundant and can be dismissed. Being unemployed, he can find a new job only under the conditions determined by the market. Despite the fact that the employee is a bearer of rights against the employer during the employment relationship, it is misleading to call him a "citizen" of the enterprise. An individual who can be "expatriated" at any moment is no "citizen" – and the employer can always take economic decisions that make the employee redundant. In reality, the worker is treated as an object. This is in contradiction to human dignity.[1]

2. Mitigating the situation

The character of being a commodity can be more obvious or less obvious, more felt or less felt. Four factors play a role in this field.

2.1. The indispensable worker

It may happen that the worker cannot be replaced because of his special qualification or his experience in the enterprise. To dismiss them would create considerable problems in the working process. There is a good chance that such workers will remain on the position they desire and that their dignity is respected, especially in cases of highly qualified persons. This is a market-created protection against dismissal. Protection against dismissal is not just one

[1] See Däubler, Das Grundrecht auf Mitbestimmung, 4. Aufl., Frankfurt/Main 1976, p. 129 et seq.

element of the situation of an employee, but the fundamental condition for the exercise of all other labour law rights.[2]

2.2. Protection by labour law

There are a lot of legal rules protecting the worker: Health and safety, fundamental rights at the workplace, minimum wages, stability of real earnings, protection against dismissal. A big part of them is judge made law whose extension varies from country to country. These legal rules reduce the character of being treated as a commodity. In some legal orders the private life of an applicant must not be examined by the employer and genetic screening is forbidden; the "commodity" must not be inspected in an "exaggerated" way.[3] Labour law rules are important especially for those workers who are not protected by the market. This implies considerable problems of implementation: One needs powerful and well-equipped authorities in order to correct the development of the market. The gap between law in the books and law in action is in most countries a quite big one. The tendency to a simple "law in the books" is especially visible in collective labour law, where the creation of institutions depends often on an initiative of the workers who elect a representation or become members of a trade union. In Germany, less than 50 % of the employees in the private sector are represented by a works council; only 58 % are protected by a collective agreement. The real conditions existing in this "shadow sector" of the economy without collective labour law often escapes the notice of labour lawyers.[4]

2.3. Collective agreements

Even nowadays, there may be a collective counterforce defending or even increasing workers´ rights. Rules in collective agreements are the most important outcome for everyday life. They improve the position of the worker by referring at the same time to the concrete situation of an enterprise or a part of the economy like metal industry, textile industry or public service. By

[2] See Hanau, Verfassungsrechtlicher Kündigungsschutz, in: Hanau/Heither/Kühling (Hrsg.), Richterliches Arbeitsrecht. Festschrift für Thomas Dieterich, München 1999, S. 201 ff.
[3] Cf. Auzero/Dockès, Droit du travail, 29e édition, Paris 2015, No 134 et seq. (French law); Däubler, Gläserne Belegschaften? Das Handbuch zum Arbeitnehmerdatenschutz, 6. Aufl., Frankfurt/Main 2015, No. 207 et seq. (German Law)
[4] Empirical evidence as to France and Germany at Artus, Interessenhandeln jenseits der Norm, Frankfurt/New York 2008, p. 187 et seq.

this way, they are more flexible than the law created by public authorities.[5] Unfortunately, this set of autonomous rules is now much less important in most of the European countries than 30 years ago, an obvious consequence of trade union weakness.

2.4. Informal rules

There are informal standards of "good behaviour" in many enterprises as well as in society. To neglect them may create protest among the workers and in the public opinion. In some cases, protest of the workers will reduce productivity: For workers, the feeling to be treated in an unjust way is an obstacle to identify themselves with their tasks and to develop good and new ideas. Public critique may damage the reputation of the enterprise. The management will be anxious to lose customers – a "sanction" which can hurt the enterprise much more than a strike of two weeks whose consequences will be overcome by overtime work within a month.[6] The existence of these informal rules differs from country to country as well as the moral values and the social consciousness of the population.

3. Returning to the market forces

The four factors are of a quite precarious nature.

The mechanisms of the market do not always provide a reliable protection: The interest of an employer not to lose qualified and experienced workers will not automatically be recognized and followed by him. One can never exclude that some employers act in damaging their own interests. The protection disappears if the enterprise (or a part of it) is closed for economic or other reasons. High qualified people will rapidly find a new job. Persons whose "value" depends on long experience in the plant will lose their "human capital" and often be in a comparable situation on the labour market as unqualified workers.

Neo-Liberalism reduces legal protection, especially in the field of employment stability, because it is considered to be an unnecessary obstacle to market freedom. Workers get a weaker position than they had before. Criticism is considered to defend outdated structures. In

[5] As to the inherent flexibility of labour law s. Däubler, Die Flexibilität des Arbeitsrechts, in: Festschrift Dieterich (above N. 2) p. 63 et seq.
[6] See Ray, Droit Social 2003, 591: „économie de la réputation"

some countries like Britain the deregulation is possible by a majority decision of Parliament whereas in other countries an amendment of the constitution would be necessary.

Neo-liberalism brings individualistic ideologies attracting even a lot of workers and their unions. The consequence is a reduction of union density in many countries and a decreasing importance of collective agreements. Once more, workers lose an important part of their protection.

Even informal rules will no more function the same way. Moral standards become less severe if the argument "this is a consequence of the market" has a high authority in public reasoning: If the free market is the best way of organizing the economy one has to accept social disadvantages. Wide-spread criticism can be found only in extreme cases.

As a result of neo-liberalism, the number of persons whose dignity is in danger increases to a considerable extent. In some societies, the majority of workers may remain without effective protection.

4. Internationalizing of the markets

Globalization is perhaps the most important economic basis for the success of neo-liberal ideology. There is not only social competition but also what you may call social dumping. Countries with a low wage level and/or a favourable exchange rate of their currency can offer goods and some services at a very low price. Enterprises from industrialized countries invest in these countries and use the comparative advantage for their products. The first well-known example for this strategy is the textile industry dating back to the 1970-ies;[7] other industries followed. In the high-wage countries the enterprises limit themselves to produce some very sophisticated products. A new international division of labour appears.

The internationalized production is not confronted with international labour law rules. UN- and ILO-Conventions exist, but normally are not implemented in low-wage countries. There is a patchwork of national rules, which in developing countries are in most of the cases of no real importance, too. Some enterprises have concluded framework agreements with

[7] Cf. Fröbel/Heinrichs/Kreye, Die neue internationale Arbeitsteilung, Reinbek 1977

international trade unions but their legal value seems doubtful. To control their application is difficult if not impossible and local subcontractors normally are not included.[8]

In the EU, the freedom to deliver services implies the right of employers to send their workers to another Member State. If the average wage level "at home" is 10 % of the wage level in the country where the work is done, automatically social dumping will occur. The EC-directive on posted workers[9] brings a modest protection. Some fundamental rules like health protection and minimum wages will apply, but there is no further adaptation to the social standards of the host country. In the construction sector collective agreements about minimum wages and annual leave apply; the Member States can include other parts of the economy. The directive is interpreted by the European Court of Justice in a way that other rules in collective agreements (e.g. about normal wages) do not apply. The Court considers the directive to have an exhausting character defining at the same time the highest possible level.[10] The control whether minimum standards are observed in concrete cases is quite difficult because a national authority cannot have a look to the bank account of the workers in their home country. Contributions to be paid to the social security system are often quite modest, because they are calculated at the basis of minimum wages and require a lower percentage than in the host country. The comparative cost-advantage remains quite important. Labour standards in the host countries, therefore, are under pressure. This brings a short-term advantage to the less developed Member States considered by them to be essential. But even at a medium-term perspective, it will come out as a disadvantage: Instead of developing the productivity of their own economies the countries of origin get money by sending their most flexible workers abroad. No transfer of technology will occur. This was already an object of discussion in the 1970-ies[11] but societies are not always learning systems.

5. Using information technology

[8] Cf. Hepple, Labour Laws and Global Trade, Oxford and Portland 2005; Zimmer, Soziale Mindeststandards und ihre Durchsetzungsmechanismen. Sicherung internationaler Mindeststandards durch Verhaltenskodizes? Baden-Baden 2008

[9] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, *Official Journal L 018 , 21/01/1997 P. 1 - 6*

[10] ECJ 11.12.2007 – C-438/05 – Viking; ECJ 18.12.2007 – C-341/05 - Laval

[11] See Däubler, Zur rechtlichen und sozialen Situation der Gastarbeiter in der BRD, Demokratie und Recht (DuR) 1974 p. 3 - 35

Information technology, especially the internet, facilitates the recourse to low price services in developing countries. A growing importance is attached to the so-called crowdworking:[12] An enterprise in Europe or the US offers small tasks in the internet which can be performed by workers all over the world. The prices are quite low because there are a lot of competitors coming from low-wage countries. Estimates say that in many cases the income is about two US-dollars an hour.[13] For more complicated tasks, one finds two kinds of contracts. The first one is (relatively) fair: Interested persons can declare that they will do the "job" and mention the conditions; the best offer will be accepted. The second one is quite unfair: all interested individuals are invited to perform the task but only the best one will get some money. The other ones have worked for nothing and even had to transfer all their copyrights to the enterprise.[14] Recently, there was a lawsuit in California dealing with the question whether the practice of crowdworking contradicts the minimum wage act of California and the US Fair Labor Standards Act.[15] Only on the basis of a broad notion of "employee" crowdworkers have a chance to invoke labour law rules.[16] In the concrete case, there was a settlement which gave 65 % of the money to the lawyers and a modest pay increase to the crowdworkers.[17]

6. Proposals to improve the situation

6.1. Better trade unions?

The decrease of union membership is not a universal one. There are some exceptions like Sweden and Belgium which could serve as an example to other countries.[18] Why not use the "best practice" in this field? The obvious objection will be that trade unions are embedded in a national tradition of industrial relations which cannot be transferred to other countries. If in one country the union manages the unemployment insurance - what can be quite important for

[12] Cf. the contributions in: Benner (ed.), Crowdwork – zurück in die Zukunft? Perspektiven digitaler Arbeit, Frankfurt/Main 2014
[13] Leimeister/Zogaj, Neue Arbeitsorganisation durch Crowdsourcing, Düsseldorf (Hans-Böckler-Stiftung) 2013 – www.boeckler.de/pdf/p_arbp_287.pdf
[14] The question whether this is compatible with the German Civil Code is examined by Däubler, Crowdworker – Schutz auch außerhalb des Arbeitsrechts? In: Benner (ed.) – Note 12 - p. 243, 253 et seq.
[15] Otey, et al., v. Crowdflower, United States District Court Northern District of California, Case No. 12-cv-05524-JST
[16] For US law see Cherry, Working for (virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace, Alabama Law Review 60 (2009) p. 1077 et seq.
[17] http://www.staffingindustry.com/Research-Publications/Daily-News
[18] Overview about membership in different European countries established by the European Trade Union Institute (ERUI): http://de.worker-participation.eu/Nationale-Arbeitsbeziehungen/Quer-durch-Europa/Gewerkschaften

getting new members – there is no realistic chance to implement this model in another country where unions have already lost a big part of their influence.

Traditional unions resemble often an industrial plant with its hierarchic setting: There is a CEO and a board of directors at the top, there are department leaders and group leaders, and there are normal collaborators. Like in big enterprises, new ideas have a difficult position: Would they not create a lot of work? Would they perhaps have an adverse effect? Are they really compatible with the principles laid down in the general programme? Could their realization change the balance between different departments? There are so many questions without any clear answer. Would it not be reasonable to renounce to such a hazardous game? The description refers to some German experiences which hopefully cannot be generalized. Nevertheless sociologists agree that the traditional structure is not adequate if you need openness to experience and innovation. Enterprises have changed a lot for the same reason, too.

In the U.S., you can find the "National Day Laborer Organizing Network" with member organisations in many states of the U.S. with a core area in California.[19] Some points seem to be of general interest. The day workers are organised in a "network". There are so-called contact persons in different parts of the big towns. They tell the members how much is paid for a certain activity and who is a good employer and who is a bad one. The bad one will, of course, be avoided. If many people ask the "contact person" the bad one will have big difficulties to find day workers at all. The union gives information which can lead to a kind of boycott. We can find the same principle in the movement of the "travelling journeymen" (called in German "Gesellenbewegung") which existed in Central Europe since the 13th century. Bad employers i. e. (at that time) craftsmen were formally "discredited"; no journeyman could conclude a contract with them without being discredited himself, too.[20] The boycott replaces in a certain way the strike and other forms of collective actions.

Can this form of organization gain importance in nowadays Europe? There are some advantages of a network in comparison with traditional organisations of the labour movement.

[19] http://ndlon.org
[20] See Däubler, in: Däubler (ed.), Arbeitskampfrecht, 3. Aufl., Baden-Baden 2011 § 1 Rn 5 et seq. (with further references)

The involved persons have a clear objective and a well defined role. The information given to a member (or even to other persons) is obviously useful and can therefore justify a small fee the person has to pay monthly.

Repression against a network is difficult. Meetings between two or three persons cannot be controlled by the authorities, the contact can easily be declared to be of a private nature.

Ideological differences play no role. The fulfilment of the function does not depend on the political opinions of the persons involved. The collaboration requires only the conviction that the situation of day workers should be improved. Whether it comes from a Christian, a socialist or a communist view of society is without any interest.

New ideas a "contact person" develops may be realized at once. Each collaborator can try to fulfil his tasks in a better way – there is no hierarchy that has to give its approval.

Would such a network not be the only solution for organizing crowdworkers?

The network solution is, however, not a universal one. It is confronted with the problem of instability – the value of the information given may be doubtful, people will seek information elsewhere. But there is one argument difficult to refute. A lot of lawyers being on the side of workers live in networks: In big towns you will find one or several law firms of this kind and they are normally in contact to comparable law firms in other towns. There are even networks all over Europe. It would be very difficult to bring these people together in the same political party; but collaboration in the interest of workers is possible. In this field you will even find persons who kept their political position from the seventies and the eighties whereas unions often gave it up without replacing it by a new perspective.

6.2. Mobilizing public opinion

Schlecker, a German retail chain, had a very specific reputation since a lot of years. During a long time, they had trouble with their works councils whose rights were often neglected. The press wrote about it the majority of newspapers supporting the works councils who were in the position of an underdog. Eventually Schlecker fully recognized the legal situation; the discussion calmed down. But the story continued. Schlecker had economic difficulties and

restructured a lot of shops especially putting smaller ones together. Workers were dismissed. During the period of notice, they received a "kind offer" to come to a firm called "Meniar" which was an abbreviation for "bringing people into jobs" ("Menschen in Arbeit"). Meniar was a temporary employment agency and a 100 % branch of Schlecker. Workers were offered new contracts with wages more than 35 % below the former level. Those who accepted were sent to a shop quite near to the place where they had worked; sometimes it was the same shop. They had to perform the same kind of work as before, but for much lower wages.

Trade unions protested but were not able to organize a strike. Press and television gave critical reports. The majority in the population was on the side of the workers; some lawyers tried to prove that the way of treating them was a circumvention of the law which guarantees acquired rights in cases of transfer of enterprises and plants. But this was not decisive. The volume of sales went down and it seemed possible that this was a consequence of the public campaign. The owners decided to close down Meniar, their temporary employment agency, improving by this way their reputation and getting back their customers.[21] Workers got their previous salaries again.

The story is told here because it shows some features which are never dealt with in labour law. Let´s assume that in the shops of Schlecker there would be a union density of 80 %. The union would have decided to fight against the intended decrease of wages demanding that Meniar should go out of business. Of course, Schlecker would have refused, the union would threaten that workers will go on strike. What would be the consequence? Schlecker would get an injunction against the union at the labour court. The strike would be prohibited because of its illegal aim: To continue or not to continue a business is a so-called entrepreneurial decision which must not be an object of a collective agreement or a strike.[22] One could organize a strike for better working conditions at Meniar – but even in such a case it is doubtful whether workers not affected by the measures could participate in a kind of solidarity strike. All these legal obstacles do not exist if press and television advocate the end of the temporary employment agency and if some consumers go to another firm. Leaving the sphere of collective bargaining becomes an advantage for the workers. Dear labour law colleagues – please bear it in mind!

[21] http://www.zeit.de/wirtschaft/2010-01/schlecker-meniar-kuendigung
[22] That is at least the prevailing opinion in Gemany; see Däubler (note 20) § 13 Note 36 et seq.

What is possible in Germany may happen in China, too. On January 1st 2008 the new labour contract law came into force. One of its provisions contained the rule that after ten years of service with the same employer a fixed-term-contract was transformed automatically into an open-ended-contract. Huawei, an IT-firm, had a lot of employees who fulfilled this condition. The enterprise "asked" them to cancel the employment contract in October or November 2007. In the beginning of January they would get a new fixed-term-contract with the conditions they had before. Legally it was as doubtful as Schlecker´s strategy, but it is difficult for a worker who wants to continue with the employer to go to court. However, the press intervened: It seemed to be obvious that the new rule was circumvented. Huawei gave in and granted open-ended-contracts to all workers concerned. [23]

Using the route of labour law would have been risky, too. It was quite unclear how the courts would decide: if it would be obvious that Huawei pressed workers to sign a cancellation contract, the court would probably have decided in favour of the workers. But what would happen if the pressure could not be proven? "The worker had asked for unpaid leave" – the employer will say. Why not? There is no necessity to use the suspension of the employment contract; an interruption of the contractual relationship is admissible, too.

Why can the public opinion get such results? The first thing you need is the personal commitment of some critical journalists and a political framework that permits such a kind of reports. A possible private owner of a newspaper will normally not be opposed as long as the articles will be read and the newspaper often quoted. The second thing is that a lot of people share social values thinking that over-exploitation is unacceptable and immoral. That is still the case in Germany as well as in France or in Spain; whether it will be the same in the United States seems to be more doubtful. In China, capitalist exploitation is still considered as a transitional phenomenon; to criticize excesses will be accepted by the big majority of the people. To share certain values is a much lower threshold than engaging in trade union activity or in a strike. Even boycotting certain goods does not require a high degree of courage. Public pressure can therefore be organized much easier than traditional collective actions.

Most enterprises are quite sensitive as to their public reputation – another advantage for the workers. They never know if some newspaper articles will have a negative impact on their

[23] http://www.wiwo.de/unternehmen/huawei-umstrittener-chinesischer-export-seite-3/5469512-3.html

volume of sales. The risk to lose customers on the market seems to be much more important than the reduction of wage costs which is normally the reason for socially unacceptable measures. The sensitivity is very high at retail firms which have a direct contact to the consumers, but it is less developed with heavy industry which sells its products to the state (weapons!) or exclusively to other enterprises.

Criticizing the behaviour of undertakings does not always deal with obvious facts like in the Schlecker or the Huawei case. It may happen that the enterprise denies the accusation affirming that everything is o.k. It may go to court in order to get an injunction giving it the right to publish a counterstatement. If the information comes from an employee we are confronted with the problems of a whistleblower whose position is quite ambiguous balancing between betrayer and hero. The European Court of Human Rights has strengthened the position of such a person who can invoke the freedom of opinion even in cases in which the facts cannot be proven. The limits of this fundamental right are passed only if the facts are wrong and the whistleblower has acted with gross negligence.[24]

What was said for press and television is also valid for the internet. Whether a blog can replace in a certain way a newspaper and become a starting point of a campaign depends on the actual role of the internet in the country. In the near future, it will be everywhere a decisive forum for public opinion. The difference to press and television is its more democratic character: one does no more need critical "journalists"; some critical bloggers can fulfil the same function. In Twitter and other social media popular persons can have many "followers" who receive automatically all their declarations. If the Chilean students´ leader Camila Vallejo has 874.000 followers[25] this is an equivalent to the power of a big newspaper. The internet can in a certain way give more possibilities to individuals than other media before. If some few people give a good and convincing evaluation of an event, that can be the starting point of a campaign against socially unacceptable behaviour of enterprises and managers.

6.3. Collective action in the internet

More and more work is done in the internet. One can use it to support collective actions in the "real world" and one can disturb the working process in the internet.

[24] European Court of Human Rights 21.7.2011 – 28274/08 – NZA 2011, 1269 - Heinisch
[25] https://twitter.com/camila_vallejo

As to the first alternative, I would like to mention the collective actions workers and their friends had realized with IBM Italy. Like in other countries, there is the internet platform "Second life". Each person can create a virtual human being ("avatar") giving him certain good and certain bad qualities. In 2007, about 3000 persons from more than 30 countries "played" the collective bargaining process at IBM Italy adding some important modifications to the reality: Hundreds of pickets were present, big demonstrations occurred and a meeting of the board of directors could not continue because many strikers entered the room. The decision-makers were highly impressed; could it not be possible that the actions in the game could become reality? The next day an agreement was signed in which IBM renounced to all intended income reductions.[26] The situation is similar to the public campaign: Unlike in a strike, the individuals did not run any risk. For some of them, the participation may have been even a funny thing bringing some new accents into the routine of everyday life.

IT-technology can be disturbed. In 2002, there was a new form of collective action against the German Lufthansa. The company had collaborated with the government bringing people back to their home countries, persons who had tried to get political asylum in Germany but were refused. It was clear that many of them would go to prison after they arrived in their country, some of them would be tortured or brought to death. An initiative of citizens protested against this practice; they developed the slogan: Three classes with Lufthansa - economy class, business class, deportation class. The conflict escalated when a Nigerian citizen arrived dead in his country despite being accompanied by two German policemen. The initiative decided to block the Lufthansa booking system by sending so many e-mails to it that it would break down. They developed a new software which sent three e-mails every second to the Lufthansa computer. During some hours the Lufthansa was off-line but then found a way out in using other computers. One of the members of the initiative was prosecuted for duress but was acquitted by the court of appeal of Frankfurt.[27]

Other forms are considered to be illegal sabotage. A computer scientist was dismissed and should be replaced by a private firm. He installed a very sophisticated computer virus which blocked the whole system two days after he left his job. The new firm was quite helpless. As a second firm could not find the reason, too, he was asked to come back as a "subcontractor"

[26] Cf. Berg/Kocher/ Platow/Schoof/Schumann, Tarifvertrags- und Arbeitskampfrecht, Kompaktkommentar, 4. Aufl., Frankfurt/Main 2013, AKR Rn. 224
[27] OLG Frankfurt/Main 22.5.2006 – 1 Sa 319/05 – CR (= Computer und Recht) 2006, 684

for a short time in order to repair the system. After some hours he succeeded but installed a new virus becoming effective two weeks later. So he was again asked to come back until by accident his method was discovered.[28] Another computer scientist changed the main passwords of his employer before leaving; so the firm was paralized during several days.[29] Another story is spread concerning a system administrator: He modified the programmes in a way that everything was deleted if in his personal file the words "dismissed by the employer" would appear.

7. Perspectives

The decline of unions and collective bargaining is not the end of defending workers´ interests. Labour lawyers will perhaps be forced to look into other fields of law like freedom of the press, consumers´ activities and internet communication. In the medium and long term this way of action can even be more efficient than traditional collective bargaining. Would it not be a good advice to be given to employers: Defend collective bargaining! You will be better off! This can (and should) be an object of further discussion.

[28] See LAG (=Landesarbeitsgericht) Saarland 1. 12. 1993 – 3 Sa 154/92 – Beilage 7/1994 zu BB S. 14
[29] See the case Hessisches LAG 13.5.2002 – 13 Sa 1268/01 - RDV (=Recht der Datenverarbeitung) 2003, 148